No. 20069

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOZANO ENTERPRISES,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Decision and Order of the National Labor Relations Board

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PETITIONER'S REPLY BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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PETITIONER'S REPLY BRIEF

I

THE EVIDENCE RELIED UPON BY THE BOARD THAT MARTINEZ WAS UNLAWFULLY LAID OFF IS INSUBSTANTIAL AND DOES NOT SUPPORT THE BOARD'S CONCLUSION.

At pages 5-7 of Petitioner's Opening Brief, cases were cited from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits, all clearly establishing that the Board's Decision in this case is contrary to the evidence and is not supported by substantial evidence considering the record as a whole.

The Board has failed wholly to meet these cases and, instead, has sought to ignore them by saying that they are of "no aid" in resolving the present case. (Board's Br., p. 7.) Considering that the cited cases from so many circuits are adverse to the Board in the present case, it is understandable that the Board would like to ignore them--and an analysis of the cases shows why:

Second Circuit:

In Bon-R Reproductions, Inc. v. NLRB, 309 F.2d 898 (2 Cir.1962), there was evidence that the discharged employee admitted to his employer that he was responsible for the union's presence (309 F.2d at 901-02) and the court sustained the Board's conclusion that the employer violated Section 8(a)(1) of the Act by threatening his employees (309 F.2d at 903). However, the court reversed the Board's conclusion that the employee was discriminatorily discharged and rejected, as a basis for showing discrimination, certain ambiguous remarks made by the employer (309 F.2d at 906-07):

> "In our judgment, to hang so much on the slim peg of a few ambiguous sentences is to allow an excerpt of the record to swallow up the whole, something which Universal Camera, supra, forbids. Without giving controlling effect to any one element, we think that the facts surrounding

Scrima's discharge, coupled with the examiner's finding on credibility, make up a record which permits only one conclusion. In the light of this record, any other conclusion would amount to a decision, supported neither by reason nor the statute, that even the least improper remarks made in the course of discharging an employee render the discharge an unfair labor practice."

The Board in the present case, as in the Bon-R Reproductions case, is hanging its conclusion that Martinez was discriminated against on "the slim peg of a few ambiguous sentences." For example, the Board complains (Board's Br., p. 3) that Laguna told Juan Baltierra that Ocariz had some "infernal machinations," that Ocariz was nobody there at the plant, and that Baltierra, by paying attention to Ocariz, would go down in rank. None of these statements in any way referred to the Union.

Likewise, the Board complains that, when Martinez admitted that he was still a member of the Union, Laguna replied "You know best." (Board's Br., p. 4.) Certainly, this remark shows no animosity; to the contrary, it shows a complete hands-off policy.

Fourth Circuit:

In NLRB v. Threads, Incorporated, 308 F.2d 1,

11-13 (4 Cir.1962), Bell was a known union adherent who did bad work on several occasions and also violated company rules. He was reprimanded but not disciplined for these lapses. Finally, following an absence from his machine, he was discharged. The Board determined that Bell was discriminatorily discharged, saying (308 F.2d at 12-13) that the company's other unfair labor practices furnished a sufficient basis for a finding that the company "utilized Bell's absences from his machine as a pretext and that it discharged him because of his union adherence." In reversing the Board, the Fourth Circuit said (308 F.2d at 13):

> "Thus the Board undertook to impose a double standard as to the value of 'background evidence.' On the one hand, throughout its order, the Board emphasized all of the elaborately detailed background evidence which it considered to be adverse to the Company's position and favorable to the Union's position. But, on the other hand, when the Company showed that it had tolerated Bell's misconduct, carelessness and disobedience for a long time after learning of his union affiliation and adherence, the Board lightly dismissed all such evidence with the statement: '<u>The fact that Bell damaged property or committed</u>

derelictions on other earlier occasions is immaterial as the Respondent [Company] did not purport to discharge him for any such alleged misconduct.' (Emphasis supplied.)

"But, what is much more serious and disturbing, the Board has either overlooked or ignored the admonition of this court that there is no legal basis for finding that the assigned reason for a discharge is nothing but a 'pretext' where it is shown, as here, that prior misconduct of an employee was tolerated under circumstances which negate any idea that the employer was searching for some false reason to discharge the employee on account of his union activities. In Martel Mills Corp.v.National Labor Relations Board, 114 F.2d 624, 632 (4th Cir.1940), this court stated:

"'* * * Had the Martel Mills desired to discharge Whittle for his union affiliations, it could very easily have selected one of the occasions when Whittle had violated the company rul or one of the occasions when his fellow-workers complained of his actions. Instead, it allowed these complaints and disturbances to accumulate until a time when the record of the individual employee served as one of the bases for

maintaining or discharging him.'" (Emphasis the court's.)

In the present case, as in the Threads case, the Board seeks "to impose a double standard."

Despite the fact that the Trial Examiner and the Board found that:

1. Martinez let a stranger operate his linotype machine (TXD, pp. 4-5);
2. Martinez left the plant and left his machine running (ibid.);
3. Martinez came to the plant while off duty and drunk and tried to start a fight (ibid.);
4. Martinez marked a time card (ibid.);
5. Martinez parked his car in a space needed to load mail bags (ibid.);
6. Martinez' denials of misdeeds or reprimands were not to be credited (id., p. 5);
7. Martinez' denials were evasive in most instances (ibid.)
8. Martinez' testimony on the above instances reflect generally on his credibility as a witness (ibid.);
9. Martinez had more instances of objectionable conduct to his credit than the one employee junior to him (id., pp. 8-9),

the Trial Examiner and the Board then say that since

"In the eyes of Respondent the instances of misconduct, occurring over the three years of his employment, were not of such magnitude as to warrant discharge; in fact, it did not prejudice his recall to employment at the very first opening in February, 1964" (id., p. 9) and since "I find that Respondent has not seriously regarded Martinez' misdeeds" (id., p. 11), therefore Martinez was laid off because he failed and refused to abandon the Union (ibid.).

In its brief, the Board advances the same contentions. (Board's Br., p. 11.)

The "double standard" applied by the Board is clear. In the first place, the Company (as noted by the Trial Examiner and the Board, TXD, p. 5) has never contended that Martinez was discharged for cause, but merely that, when the Company was confronted with the necessity of having to lay off an employee, Martinez was selected because he was not as good an employee as the only employee junior to him. If the Company had been searching for a pretext to discharge Martinez because of his union activities, "it could very easily have selected one of the occasions when [Martinez] had violated the company rules or one of the occasions when his fellow-workers complained of his actions. Instead, it allowed these complaints and disturbances to accumulate until a time when the record of the individual employee served as one of the bases for

maintaining or discharging him." NLRB v. Threads, Incorporated, supra, 308 F.2d at 13.

In the second place, if the Company really wanted to get rid of Martinez because of his union activities, it is incomprehensible that Lozano would have promised to recall him at the very first opportunity, as found by the Board (TXD, p. 7), and that he was in fact recalled at the first opening, as found by the Board (Id., p. 9; p. 10).

> "If discrimination may be inferred from mere participation in union organization and activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership."
>
> NLRB v. United Brass Works, Inc.,
> 287 F.2d 689, 693 (4 Cir.1961).

Fifth Circuit:

In NLRB v. Huber & Huber Motor Exp., 223 F.2d 748 (5 Cir.1955), there was evidence that the discharged employee had been obnoxious and aggressive in the performance of certain protected union activities. He also failed to comply with a company rule. In reversing the Board's determination that the employee had been dis-

criminatorily discharged and that the rule violation "was only a shadow, but opportune pretext" to screen the true motive for the discharge, the court said (223 F.2d at 749):

> ". . . [W]here the Board could as reasonably infer a proper collateral motive as an unlawful one, the act of management cannot be set aside by the Board as being improperly motivated. National Labor Relations Board v. Houston Chronicle Publishing Company, 5 Cir., 211 F.2d 848. National Labor Relations Board v. Blue Bell Inc., 5 Cir., 220 F.2d.
>
> "Where a legal ground for discharge existed - as it did in this case - and the employee was discharged on that ground alone, obnoxious conduct on his part, in an activity protected by Section 7 of the Act, will not insulate him from being discharged on such legal ground."

In the present case, the Trial Examiner and the Board found that "it necessarily follows that to maintain this quota of employees in this department, one employee would have to be terminated to make a position available for Villasenor." (TXD, p. 3.)

Martinez testified that at the time of his lay-off,

Laguna told him that it was for discriminatory purposes (id., p. 6). This was denied by Laguna (ibid.). The Trial Examiner and the Board specifically discredited Martinez' version and credited Laguna's, and found no such "crucial" statement, indicating a discriminatory motive, was made by Laguna (ibid.). The Trial Examiner and the Board also discredited Martinez' testimony that Lozano told him that "other obligations" dictated the choice of Martinez for the lay-off (id., p. 7).

The Trial Examiner and the Board also found that Martinez had more instances of objectionable conduct to his credit than the one employee junior to him (id., pp. 8-9).

Thus, the sole ground given to Martinez in his notice of the lay-off, as found by the Trial Examiner and the Board, was the reinstatement of Villasenor. As in the Huber & Huber case (223 F.2d at 749), "the parties are not in dispute that the sole ground in the notice of discharge" was to make room for Villasenor and "where the Board could as reasonably infer a proper collateral motive as an unlawful one, the act of the management cannot be set aside by the Board as being improperly motivated."

The slim basis upon which the Trial Examiner and the Board found that Laguna was discriminatory against Martinez was Martinez' testimony that, upon occasion,

Laguna solicited Martinez to abandon the Union (TXD, pp. 7-8). The Trial Examiner and the Board did not credit Laguna's denials of these solicitations (id., p. 8).

At the same time, however, the Trial Examiner and the Board characterized other of Martinez' testimony as "evasive" (id., p. 5) and questioned his general credibility as a witness (ibid.). The Trial Examiner and the Board expressly discredited Martinez' testimony seven distinct times (id., p. 5, line 11; p. 5, lines 23-24; p. 5, line 35; p. 6, lines 34-38; p. 6, lines 41-42; p. 7, lines 21-22; p. 8, lines 31-32).

Further, the Trial Examiner and the Board say that the testimony of Martinez "to the solicitations to abandon the Union is supported by the credible testimony of Baltierra and Villasenor" (id., p. 8); however, the transcript may be searched in vain for any testimony by Baltierra or Villasenor that they ever heard any such solicitations by Laguna to Martinez.

In addition, the Trial Examiner and the Board expressly concluded that none of such solicitations constituted threats or promises or were independent 8(a)(1) violations (id., p. 7; p. 9; p. 10) and that Martinez was not laid off because of having testified at a prior hearing (id., p. 10; p. 11).

Further, the Trial Examiner and the Board found that Laguna even went so far in his friendship for

Martinez as to have his wife help Martinez' wife when she had a baby (id., p. 8); this is not consistent with an "animus" against Martinez.

Considering the Trial Examiner's and the Board's general discrediting of Martinez as a witness; their findings that no discriminatory statements were made at the time of Martinez' lay-off; their conclusions of no independent 8(a)(1) or 8(a)(4) violations; their finding that room had to be made for the return of Villasenor; their finding that Martinez was the most junior but one of the employees, but had more instances of objectionable conduct - considering all these factors, it is incredible that the Trial Examiner and the Board can, with a straight face, contend that there has been discrimination.

The situation is parallel to that in NLRB v. Florida Steel Corp., 308 F.2d 931, 935 (5 Cir.1962), where, in reversing the Board's finding of discrimination, the court was critical of the undue probative value given by the Trial Examiner and the Board to the testimony of a chief witness who, just as with Martinez in the present case, was specifically discredited by the Trial Examiner.

Sixth Circuit:

In NLRB v. Dixie Terminal Co., 210 F.2d 538 (6 Cir. 1954), employee Ross participated in union activities and also refused to take over the job of starter of a passenger elevator. The Board found that Ross was discharged

because of his union activities. In reversing the Board, the court said (210 F.2d at 540):

> "We are also of the opinion that the discharge of Ross was justified by Ross's refusal to accept his assignment of duty. The fact that he was participating in organizing the union does not prevent his discharge for cause. N.L.R.B. v. West Ohio Gas Co., 6 Cir., 172 F.2d 685, 688; N.L.R.B. v. Mylan-Sparta Co., 6 Cir., 166 F.2d 485, 491."

In the present case, Martinez, as found by the Trial Examiner and the Board, had more instances of objectionable conduct to his credit than the one employee junior to him; the fact that he was a union member does not prevent his being selected for lay-off in lieu of a better employee.

Seventh Circuit:

In NLRB v. Milwaukee Elec. Tool Corp., 237 F.2d 75 (7 Cir.1956), the discharged employee was an active union supporter and the company's president had testified that he felt that an employee who attempted to influence other employees to join the union by telling them they would have to join was engaged in sufficient disloyalty to warrant discharge. In reversing the Board's finding of

a discriminatory discharge, the court said (237 F.2d at 78):

> "As we read the Board's argument, studded with handpicked fragments of evidence, it collides with several pertinent propositions stated by Judge Lindley when delivering the majority opinion reported as N.L.R.B. v. Wagner Iron Works, 7 Cir., 1955, 220 F.2d 126, 133: 'Obviously, the Act does not interfere with the employer's right to conduct his business, and, in doing so, to select and discharge his employees. It proscribes the exercise of the right to hire and fire only when it is employed as a discriminatory device. [Citing.] The Board may not "substitute its judgment for that of the employer as to what is sufficient cause for discharge" [citing] and discrimination may not be inferred from an employee's mere membership in a union. [Citing.] * * *'
>
> "The utterances of Siebert are, on this record, insufficient to make the discharge of Stempniewski more than suspect, but not discriminatory. They fail, in our opinion, to support the Board's findings in this regard."

In the present case, in the light of the Trial Examiner's and the Board's findings that there were no independent 8(a)(1) or 8(a)(4) violations, that Martinez' testimony that discriminatory reasons were given to him for his lay-off could not be believed, that Martinez had more instances of objectionable conduct to his credit than the one employee junior to him, and that someone had to be laid off to make room for Villasenor, the Board's brief, referring as it does to such vague statements as "infernal machinations" and "You know best," presents an argument "studded with handpicked fragments of evidence" that, even considered in their worst light, are "insufficient to make [the lay-off of Martinez] more than suspect, but not discriminatory."

Eighth Circuit:

In NLRB v. Ace Comb Company, 342 F.2d 841 (8 Cir.1965), unlike the present case, it was found by the Board and sustained by the court that the company had engaged in independent threatening and coercive conduct. There was thus more evidence of anti-union animus than there is in the present case, where both the Trial Examiner and the Board have found no independent 8(a)(1) violations. However, the court reversed the Board's determination that the employee was discriminatorily discharged and, after reviewing the applicable general principles of law prescribed by the United States Supreme

Court, the Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth Circuits (342 F.2d at 847-48), held (quoting from the Ninth Circuit) as follows, in words particularly in point to the present case (342 F.2d at 848):

> "In other words, here the evidence abounds that there was a justifiable cause for Woodliff's discharge. Assigning an illegal cause therefor is only possible by drawing an inference from certain vague statements on the part of management officials, while ignoring positive evidence arrayed against such inferences. 'Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.' N.L.R.B. v. Citizen-News Co., 134 F.2d 970, 974 (9 Cir.1943). This being so, we cannot conscientiously hold that the record as a whole contains substantial evidence that the discharge of Woodliff was motivated by other than lawful business reasons."

In the present case, the evidence (and the findings of the Trial Examiner and the Board) abound that there was justifiable cause for Martinez' lay-off, including the necessity to lay off someone, Martinez' low seniority, and

the fact that the one more junior employee was a better employee. To assign an illegal cause for his lay-off "is only possible by drawing an inference from certain vague statements on the part of management officials, while ignoring positive evidence arrayed against such inferences."

Here, the Board seems to think it has support for its case in the fact that the Company discussed the lay-off with its attorney and was advised that the surest way to stay out of trouble was to follow strict seniority, but that the Company disregarded this advice. (Board's Br., p. 5-6.) This is just the sort of inference that is condemned in the Ace Comb case. If anything, the Company's seeking the advice of its attorney, being concerned about the discriminatory implications, and still selecting Martinez for the lay-off shows that the motive in picking Martinez was non-discriminatory.

Ninth Circuit:

One of the earliest cases involving the subject matter of the present case, and the case which is controlling here, is NLRB v. Citizen-News Co., 134 F.2d 970 (9 Cir.1943), where this Court reversed the Board's determination that a discharge was discriminatory, and in language directly in point to the present case where the evidence shows, and the Board has found, that Villasenor's return was a valid reason for the lay-off, that Martinez

was the most junior but one of the employees, and that that employee was a better employee, said (134 F.2d at 973-74):

> "In considering this question it should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance. The mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act. . . . Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.
>
> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities There must be more than this to constitute substantial evidence."

In the present case, the Board apparently finds it "suspicious" that, shortly after one of the instances of his misconduct, Martinez was transferred to the night shift from the substitute position, thus getting a

wage premium (Board's Br., p. 11). The Board apparently infers that this was a "promotion" for Martinez, hence his misconduct was not regarded seriously by the Company, hence it could not have been a reason for his lay-off, hence the only remaining reason had to be discriminatory. This reasoning, however, ignores the explicit finding of the Trial Examiner and the Board that, whether or not Martinez' instances of misconduct were sufficiently serious to cause his discharge, they were at least more numerous than those of the only employee junior to him. It is wholly immaterial whether or not the misconduct was sufficiently serious to cause his discharge or to prevent his recall - the issue is not whether the Company had grounds for discharging Martinez for cause, but whether, when a lay-off (as distinguished from a discharge) was necessary, Martinez was as good an employee as the only one junior to him. Both the Trial Examiner and the Board have found that he was not, and it is irrelevant that the Company may have earlier tolerated his misconduct.

In any event, the transfer of Martinez from the substitute position to the night shift, with its wage premium for working at night, was in no way a "promotion." The uncontradicted evidence is that Martinez was put on the night shift because Barunda was made the substitute worker because he was "the more desirable employee to work alone without direct supervision" (TXD, p. 5).

On the other hand, if the night shift be considered an advancement, Martinez' "dues paying status with the Union did not interfere with his advancement" (id., p. 9), and it then becomes absurd to say, as does the Board, that because the Company "advanced" Martinez despite his union membership this proves that when he was laid off, it was because of his union membership. This is exactly the 180-degree swing criticized and rejected in NLRB v. Sebastopol Apple Growers Union, 269 F.2d 705, 713 (9 Cir. 1959), citing from NLRB v. McGahey, 233 F.2d 406, 412 (5 Cir.1956):

> "The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if the lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said:

management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

District of Columbia Circuit:

The District of Columbia Circuit is in accord with all of the other cited Circuits.

In Metal Processors' Union Local No. 16, AFL-CIO v. NLRB, 337 F.2d 114 (DC Cir.1964), in sustaining the Board's determination that a discharge was not discriminatory despite the fact that the employee had engaged in union activities preceding his discharge, the court points out that there was no evidence to indicate company hostility toward the employee and that differences between the foreman and the employee were amicably worked out (337 F.2d at 117). This is parallel to the present case, where Martinez' wife helped the foreman Laguna's wife when she had a baby (TXD, p. 8), and where the so-called solicitations by Laguna to Martinez to leave the Union carried no hostility (Board's Br., p. 4), and where the Trial Examiner

and the Board specifically found no evidence of independent threats or coercion (TXD, p. 7), and where the Trial Examiner and the Board found that Martinez' advancement was not impeded by his Union membership (id., p. 9). As said in the Metal Processors' Union case (337 F.2d at 117)

> "The Union argues further that the Board erred in rejecting certain evidence which, it is said, established general Company hostility toward the Union, from which, in turn, it may be inferred that Zajac's discharge was discriminatory. With this we cannot agree. Even if it were assumed arguendo that the evidence referred to did establish general Company animosity toward the Union, it would be insufficient in itself to ground the inference that Zajac's discharge was violative of the Act. As the court in N.L.R.B. v. Redwing Carriers, Inc., 284 F.2d 397, 402 (5th Cir.1960), observed:
>
> "'The opposition of an employer to union organization and even unlawful interference are not enough without more to make the discharge of an employee wrongful. N.L.R.B. v. Hudson Pulp & Paper Corp., 5 Cir., 273 F.2d 660; N.L.R.B. v. McGahey, 5 Cir., 233 F.2d 406.'"

CONCLUSION

This is a case where the Board's decision, predicated solely upon a few ambiguous statements attributed to management or upon a few non-hostile solicitations to Martinez to leave the Union or upon some old statements made in 1961 in another case (Board's Br., pp. 3-4, pp. 8-9), finds discrimination. But the Board's decision is contrary to court decisions in the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits. It is grounded upon speculation and mere suspicion. It is contrary to its own findings as to the relative merit of Martinez compared to the only employee junior to him. It involves 180-degree swings, finding, as it does, that Martinez was advanced <u>despite</u> his union membership and then laid off <u>because of</u> it and then later re-called <u>despite it</u>. It discredits Martinez as a witness <u>seven</u> times, including his general credibility, and then gives undue probative value to his testimony that he was solicited to leave the Union.

This is a case where, unsupported by the evidence, and in fact contrary to its own findings on Martinez' comparative merit, the Board has determined that there was discrimination. But the mere fact that the Board says that there was discrimination does not make it so; the Board's determination cannot exist without the support of substantial evidence.

DATED: December 27, 1965.

Respectfully submitted,

SHEPPARD,MULLIN,RICHTER & HAMPTON
FRANK SIMPSON

Attorneys for Petitioner

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those Rules.

Frank Simpson

PROOF OF SERVICE

I, the undersigned, being first duly sworn, say that I am and was at all times herein mentioned a United States citizen and a Los Angeles, California, resident, over 18 years of age and not a party to the within action; that on 27 December 1965 I served the within Petitioner's Reply Brief on the below-named parties in said action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Government at Los Angeles, California, addressed as follows:

National Labor Relations Board (3 copies)
Washington 25, D.C.

General Counsel, National Labor Relations Board, Region 21
849 South Broadway, Los Angeles, California 90014

James R. Webster, Esquire, Trial Examiner
National Labor Relations Board
Federal Building
450 Golden Gate Avenue
San Francisco, California

E. M. Dorsey

Subscribed and sworn to
before me 27 December 1965.

Shirley Schuster

Notary Public, California
Principal office, Los Angeles
County

OFFICIAL SEAL
SHIRLEY SCHUSTER
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY